The SCR fall within the meaning of "written law" in that proviso. Therefore, it is the SCR which has to be looked into when making any application for the enlargement of time within which the security for the costs of the appeal is to be lodged in the Court. Order 49 r. 2 (5) (b) of the SCR clearly empowers the Court appealed from to enlarge the time beyond the fourteen-day period within which the security is to be lodged. That Court will of course have to have regard to the circumstances obtaining and decide whether the reasons given for failing to lodge the security within time are sufficient to allow the application. In this regard no doubt that Court will bear in mind the authorities on point and exercise its discretion appropriately.

I therefore hold that this Court lacks the power and jurisdiction to hear the enlargement of time application herein. This is because O. 49 r. 2 (5) (b) of the SCR specifically provides for such an application to be made to the Court appealed from. In these circumstances should the High Court hear the application, it would be arrogating to itself a power and jurisdiction which is not conferred upon it by law. I am fortified in taking this approach by Article 121 of the Federal Constitution as amended by Act A704 which came into force in 1983. That Article stipulates *inter alia* that the High Court and inferior Courts shall have such jurisdiction and powers as may be conferred by or under federal law. The jurisdiction and power to enlarge time in this case is clearly conferred on the inferior Court concerned by O. 49 r. 2 (5) (b) of the SCR and therefore it is that Court which should exercise that power and jurisdiction and not the High Court. In the circumstances I hold that the enlargement of time application should not in the first place have been made to the High Court and since that application was misconceived this application for leave to appeal to the Supreme Court must necessarily fail and I therefore make an order dismissing this application. There will be no order as to costs as the respondent chose to be heard on this *ex parte* application.

TEH TEIK SOOI

v.

LIM KOK HEANG & 6 ORS.

HIGH COURT, PENANG
TAN SRI DATUK EDGAR JOSEPH JR. SCJ
[CIVIL SUIT NO. 22-27-87]
10 APRIL 1993

PRACTICE & PROCEDURE: Amendment of pleadings - Application for leave to amend statement of claim made subsequent to an application to strike out statement of claim - Principles governing amendment of pleadings - Power of Court to amend under O. 18 r. 19 Rules of the High Court.

The plaintiff commenced an action against the defendants for a declaration that the plaintiff is a partner in a partnership business known as Hotel Kuala Lumpur, in which the defendants were partners; by virtue of half share through the first defendant and that the second to the seventh defendants having known, acquiesced and/or consented to the plaintiff holding the half share through the first defendant. The plaintiff also prayed for an account of what was due to him from the defendants in respect of money received by the defendants and for an order for payment by the defendants to the plaintiff of any sum found due upon such account. The second to seventh defendants filed an application for an order that the plaintiffs' statement of claim be struck out under O. 18 r. 19 of the Rules of the High Court 1980. But before their application was heard, the plaintiff filed an application for leave to amend their statement of claim by raising the existence of a trust and a novation of the partnership agreement. When the applications were heard in chambers it was ordered that the statement of claim be struck out and leave was refused to amend the statement of claim. The matter was then adjourned to open Court for further argument.

Held

[1] The rule governing the amendment of pleadings is that an amendment should be allowed if it can be made without injustice to the other side and there is no injustice if the other side can be compensated by costs.

[2] As a rule an amendment ought to be allowed if thereby the real substantial question in controversy can be raised between the parties and to avoid multiplicity of legal proceedings.

[3] In the present case, the application to amend was made *bona fide* and in order that justice be done the application for leave to amend was allowed. The second to seventh defendants will not, in any way, be injured or prejudiced by allowing the amendment which can be compensated by costs.

[Order made in chambers reversed. Application to strike out the statement of claim dismissed with no order as to costs. Application to amend statement of claim allowed with costs to be paid by the plaintiff to the second to seventh defendants].

Cases referred to:
Att. Gen Republic of Peru v. Peruvian Guano Co. [1887] 36 Ch D 489, 498 ***(refd)***
Wenlock v. Maloney [1965] 1 WLR 1238 ***(refd)***
Dyson v. AG [1911] 1 KB 410, 419 ***(refd)***
Ex p. Barrow [1815] 2 Rose 255 ***(refd)***
Tildesley v. Harper [1878] 7 Ch D 403 ***(refd)***
Cropper v. Smith [1884] 2 Ch D 700 ***(refd)***

Legislation referred to:
Registration of Businesses Act 1956
Rules of the High Court 1980, O. 18 r. 19, O. 20

For the plaintiff - Tan Kah Hoo; M/s. Gan Teik Chee & Ho
For the defendants - Tan Phock Kin; M/s. N. Patkunam & Co.

JUDGMENT

Edgar Joseph Jr. SCJ:
This was an application to strike out the statement of claim insofar as it concerns the second to the seventh defendants on the ground that it discloses no reasonable cause of action and/or that it is scandalous, frivolous or vexatious and/or that it is an abuse of the process of the Court and that the action be dismissed as against them. The application was made under O. 18 r. 19 and also under the inherent jurisdiction of the Court.

It is well established that where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence, no evidence is admitted (*Att. Gen Republic of Peru v. Peruvian Guano Co.* [1887] 36 Ch D 489, 498) and where the only ground on which the application on which the statement of claim can be said to disclose no reasonable cause of action is that the action is unlikely to succeed, affidavit evidence is equally inadmissible (*Wenlock v. Maloney* [1965] 1 WLR 1238). However, in an application on any of the other grounds mentioned in the rule or where the inherent jurisdiction of the Court is invoked, affidavit evidence may be and is ordinarily used. Moreover, on an application to strike out the statement of claim or to dismiss the action, it is not permissible to try the action on affidavits when the facts and issues are in dispute. (See *Wenlock v. Moloney ibid*). Also to be borne in mind is the principle that the Court will not permit a plaintiff to be driven from the judgment seat "except where the cause of action is obviously bad and almost incontestably bad." (Per Fletcher Moulton LJ in *Dyson v. AG* [1911] 1 KB 410, 419). Lastly, the rule empowers the Court to amend any pleading or endorsement or any matter therein. This power is additional to the powers of the Court to amend under O. 20. So its incorporation in this rule emphasises that in suitable and proper cases the Court may exercise its coercive and curative powers at the same time.

It is with the above principles in mind that I turn to consider the application before me which I had adjourned into Court for further argument having earlier granted it in Chambers.

I must now address myself to the statement of claim which is sought to be struck out.

By way of introduction the plaintiff alleged that at all material times to the suit the first to the fifth defendants are partners in a partnership business known as Hotel Kuala Lumpur carrying on business at Butterworth ("the partnership business") while the sixth and the seventh defendants became partners on 1 April 1984 as a result of succeeding to the share of their deceased father Kau Pee Tee who had been a partner.

It was alleged that the plaintiff was also, at all material times, a partner of the partnership business, in respect of a half share through the first defendant, the second to the seventh defendants having known, acquiesced and/or consented to the plaintiff holding the half share through the first defendant. However, the plaintiff's share had never been registered under the provisions of the Registration of Businesses Act and although no written agreement evidencing the plaintiff's alleged share in the partnership was ever signed, the plaintiff did produce, by way of affidavit, profit and loss accounts of the partnership business for the

years 1979 to 1981 and 1983 and 1984. The plaintiff further produced, his income tax Assessment Notices showing his share in the partnership business income from 1971 to 1982 upon which he was duly taxed by the Department of Inland Revenue.

The plaintiff went on to allege both in his statement of claim and in his affidavit that in respect of the period 1971 to 1984 there is due and owing to him from the partnership business a sum of RM103,705 representing his share of the profits of which only RM39,000 had been paid, leaving a balance of RM64,705 still due and owing to him. Notwithstanding, a demand made by his solicitors in writing by letter dated 19 November 1986, for this balance sum, and also that his name be registered as a partner in the partnership business, the defendants had complied with neither demand.

The plaintiff accordingly prayed for the following reliefs:

(a) A declaration that the plaintiff is a partner of Hotel Kuala Lumpur and all consequential orders;
(b) An account of what is due to the plaintiff from the defendants in respect of money received by the defendants as the plaintiff's agent and/or partner and/or for or on account of the plaintiff or which might have been so received but for the defendants' wilful default or neglect for the years 1971 until to date;
(c) An order for payment by the defendants to the plaintiff of any sum found due upon taking such account;
(d) All further proper accounts, inquiries and directions;
(e) Costs.

By their joint defence, the second to the seventh defendants denied the plaintiff's allegation that he was a partner in the partnership business and they further denied that they knew of the arrangement whereby the plaintiff was said to have a half share through the first defendant; in particular, they have alleged:

2. The second to the seventh defendants deny paragraph 3 of the statement of claim and aver that:

(a) the plaintiff, at all material times was never a partner of Hotel Kuala Lumpur holding the shares as alleged therein; and

(b) they have no knowledge nor did they acquiesce or consent to the plaintiff holding the said shares as alleged.

3. The second to the seventh defendants further aver:

(a) that it is expressly provided in Clause 14 of the Partnership Agreement dated 20 February 1974 of all partners of Hotel Kuala Lumpur that - "In the event of a partner wishing to sell out his share of the partnership it shall be a condition precedent that his share be offered to the remaining partners and the highest bidder partner will be allowed to purchase same and only in the event of their refusing to purchase them he may sell his share to an outsider"; and

(b) no such offer was made by the first defendant nor did the first defendant give any indication to the partnership business that he had sold a portion of his share to the plaintiff.

4. In the circumstances, there is no cause for the plaintiff to claim that he is a partner of the said partnership business.

Upon the defence as it now stands, it could be plausibly argued that the plaintiff is not a partner of the partnership business, but at best a sub-partner of the first defendant, especially so, since nowhere in the statement of claim was it suggested that Clause 14 of the Partnership Agreement dated 20 February 1974, which governed the legal relations of the partners, had been complied with.

The legal position of a sub-partner was succintly put by Lord Eldon in *Ex p. Barrow* [1815] 2 Rose 255, thus:

> I take it to have been long since established, that a man may become a partner with A where A and B are partners and yet not be a member of that partnership which existed between A and B. In the case of *Sir Chas. Raymond* a banker in the city, a Mr. Fletcher agreed with Sir Chas. Raymond that he should be interested so far as to receive a share of his profits of the business, and which share he had a right to draw out from the firm of Raymond & Co. But it was held that he was no partner in that partnership; had no demand against it; had no account in it; and that he must be satisfied with a share of the profits arising and given to Sir Chas. Raymond.

Counsel for the plaintiff recognising the infirmity of his case sought leave to amend his statement of claim, by summons in chambers (En 19) by adding the following new paras to his statement of claim:

5. The business of Hotel Kuala Lumpur was initially started by the first to fifth defendants and Kao Pee Kee deceased as equal partners and the plaintiff was invited by the first defendant to take up $^1/_2$ of his share in the said business with the knowledge and consent of the other partners.
6. Though the plaintiff was not a registered partner, he was a partner as he owned $^1/_2$ share held on his behalf by the first defendant. All the other partners were aware of this.
7. The plaintiff had been taxed by the Income Tax Department for profits (dividends) derived from his $^1/_2$ share held under the name of the 1st defendant.
8. It was initially agreed by the partners that Hotel Kuala Lumpur though a partnership will ultimately be converted into a limited company and that the plaintiff's unregistered share would be converted to shares in the limited company and given share certificates.
9. The partnership business has now been sold to Kah Lean Holdings Sdn. Bhd. The defendants failed and/or refused to register the plaintff's interest thereby in breach of the agreement averred to in paragraph 8 of the statement of claim.

There was also a prayer for consequential amendments of the relief sought in the statement of claim.

The Court has wide and ample powers to allow the amendment of pleadings. Thus a party has generally little difficulty in obtaining leave to amend his own pleadings, provided his application is not left to a stage so late in the proceedings that to allow an amendment then would be unjust to his opponent. "However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated for by costs." If, on the other hand, the amendment will put the other side into such a position that they must be injured, it ought not to be made. In *Tildesley v. Harper* [1878] 7 Ch D 403 which may be taken as a *locus classicus*, Bramwell LJ said:

> My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.

In *Cropper v. Smith* [1884] 2 Ch D 700 the practice was expressed on the basis of a wider principle by Bowen LJ:

> I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right.

An amendment ought therefore as a rule to be allowed if thereby the real substantial question in controversy can be raised between the parties and to avoid multiplicity of legal proceedings.

Looking at paras 5 to 9 of the proposed amended statement of claim, it may be, that if at the trial the plaintiff is able to establish the same, it might enable him to overcome the problem he faces with regard to the statement of claim in the form it now takes, to which I have briefly adverted. This is because, on the version of the facts now advanced by the plaintiff in his proposed amended statement of claim, he is avering what might give rise to a trust in respect of what he alleges is his share of the partnership business in his favour, the trust being created by the alleged oral agreement between the first defendant on the one part and the other defendants of the other part. To put it another way, the terms of paras 5 to 9 of the amended statement of claim, if true, might be sufficient to raise the existence of a novation of the partnership agreement, whereby the plaintiff was introduced as a sleeping partner with the concurrence of all the other partners.

I have asked myself with regard to this application for leave to amend: "Is this application genuine or what lies behind the application?" The amendment must not be dishonest, nor

intended to over-reach the opposite party or made for any other ulterior motive.

After careful consideration, not forgetting, that the case for novation was not advanced at the first opportunity, and at a late stage, only after the application to strike out the statement of claim was made, I think that probably the delay was due to lack of deligence, on the part of instructing solicitors in eliciting the necessary facts from their client, when they were first consulted, and before sending their letter before action.

I have thus arrived at the conclusion that the application to amend is made *bona fide*, and, in the exercise of my discretion in order that justice may be done in this case, I allow the application for leave to amend. The second to the seventh defendants will not, in any way, be injured or prejudiced by allowing the amendment which can be compensated by costs. It follows, that the costs of the amendement must be paid by the plaintiff to the second to the seventh defendants, in any event.

I therefore reverse the order I had made in chambers that the statement of claim be struck out as also my order refusing leave to amend the statement of claim. Accordingly, the application to strike out the statement of claim is dismissed with no order as to costs while the application to amend the statement of claim is allowed. The defendants are thus at liberty to make such amendments to their respective defences as may be necessary to meet the plaintiff's case as disclosed by the amended statement of claim. The plaintiff's application for leave to cross examine the second to the seventh defendants on their affidavit filed in connection with the proceedings to strike out the statement of claim, will serve no useful purpose and is dismissed with no order as to costs.

WADKIN ROBINSON (MALAYSIA) SDN. BHD.

v.

RIMBER INDUSTRIES SDN. BHD.

HIGH COURT, SHAH ALAM
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS JC
[CIVIL SUIT NO. 22-441-1992]
24 MARCH 1994

PRACTICE & PROCEDURE: Summary judgment - Claim for payment for goods sold and delivered - Goods do not conform to order specifications - Whether there was acceptance of the goods delivered.

This was an application for summary judgment whereupon the defendant applied for further arguments before the learned Judge.

The plaintiff's claim was for RM108,015.10 for payment of goods sold and delivered to the defendant. The defendant denied the debt contending that the delivery of a machine called the planner moulder had not conformed to their order specification and that as a result of the wrong delivery the defendant had suffered loss in excess of the sum claimed by the plaintiff. The defendant counterclaimed for RM336,672.01.

It was alleged by the plaintiff that there had been acceptance of the delivery as there was acknowledgment by the defendant of the delivery order without condition and with no express reservation. However, the defendant had thereafter sent several letters on the subject rejecting the moulder delivered. The Court addressed the issue of whether there had been acceptance of the goods delivered.

Held:

[1] The mere signing of the delivery order by the defendant cannot be regarded as acceptance of the goods in view of s. 41(1) Sale of Goods Act 1957. The signing merely went to show an acknowledgment by the defendant that the machinery stated in the delivery order had been delivered to the defendant. The plaintiff had misleadingly printed the exact moulder the defendant had ordered on the delivery order when actually it was of a different type.

[2] Although the defendant retained the moulder for a length of time, nonetheless it is